

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

G & G FREMONT, LLC, et al.,

Plaintiff(s),

v.

CITY OF LAS VEGAS,

Defendant(s).

Case No. 2:14-CV-1006 JCM (PAL)

ORDER

Presently before the court is a motion for preliminary injunction filed by plaintiffs G&G Fremont, LLC and Crazy Ely Western Village, LLC (collectively “plaintiffs”). (Doc. # 10). Defendant City of Las Vegas (hereinafter “defendant”) filed a response, (doc. # 14), and plaintiffs filed a reply, (doc. # 19).

I. Background

Plaintiffs own and operate three souvenir and packaged liquor stores along the Fremont Street Experience in Las Vegas. (Doc. # 1). They brought the instant action against the City of Las Vegas, alleging that the city was targeting packaged liquor sellers by enforcing certain ordinances against them.

The city passed ordinance number 6320 as part of a regulatory scheme aimed to reduce problems caused by high alcohol consumption near the Fremont Street Experience. (Doc. # 1, 14). The ordinance applies to package liquor sellers adjacent to or on a pedestrian mall. It restricts the sale of single-serving alcoholic products and products of greater than 32 ounces or more than eleven percent alcohol by volume. LVMC 6.50.475. It forbids posting prices visible to individuals outside the establishment, limits advertising to the windows of the establishment, and limits the percentage of window space that may be used for advertising. *Id.* Finally, the

1 ordinance restricts the percentage of window space that may be used to advertise alcoholic
 2 beverages, and requires liquor sellers to post a sign indicating that consumption on the Fremont
 3 Street Experience is forbidden. *Id.*

4 In their complaint, plaintiffs assert claims for violations of equal protection, procedural
 5 due process, substantive due process, and the First Amendment. (Doc. # 1). They also claim
 6 that the ordinances are unconstitutionally vague, that the regulatory scheme is an
 7 unconstitutional bill of attainder, and that the regulations constitute a taking. (Doc. # 1). They
 8 assert claims for violations of their civil rights under 42 U.S.C. § 1983 and claim that the
 9 ordinances violate section 1 of the Sherman Antitrust Act. (Doc. # 1). Their complaint seeks
 10 declaratory relief as well as a preliminary and permanent injunction.

11 **II. Legal Standard**

12 Federal Rule of Civil Procedure 65 provides that the court may issue a preliminary
 13 injunction on notice to the adverse party. Fed. R. Civ. P. 65(a)(1). A preliminary injunction
 14 seeks to preserve the status quo and prevent irreparable harm from occurring before a judgment
 15 is issued. *Textile Unlimited Inc. v. BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001).

16 The Supreme Court has stated that courts must consider the following elements in
 17 determining whether to issue a preliminary injunction: (1) likelihood of success on the merits; (2)
 18 likelihood of irreparable injury if preliminary relief is not granted; (3) balance of hardships; and
 19 (4) advancement of the public interest. *Winter v. N.R.D.C.*, 555 U.S. 7, 20 (2008). The test is
 20 conjunctive, meaning the party seeking the injunction must satisfy each element.

21 Additionally, post-*Winter*, the Ninth Circuit has maintained its serious question and
 22 sliding scale tests. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.
 23 2011). “Under this approach, the elements of the preliminary injunction test are balanced, so that
 24 a stronger showing of one element may offset a weaker showing of another.” *Id.*

25 “Serious questions going to the merits and a balance of hardships that tips sharply
 26 towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also
 27 shows that there is a likelihood of irreparable injury and that the injunction is in the public
 28 interest.” *Id.* at 1135.

1 **III. Discussion**

2 In their motion for a preliminary injunction, plaintiffs seek to enjoin enforcement of the
 3 city's "package liquor ordinances," ("the ordinances") which they allege are unconstitutional.
 4 (Doc. # 10). In particular, plaintiffs argue that the ordinances (1) violate the First Amendment,
 5 (2) constitute an unconstitutional bill of attainder, (3) are preempted by the Sherman Antitrust
 6 Act, and (4) violate their procedural due process rights. (Doc. # 10). Defendant responds that
 7 the ordinances are constitutional and that enforcing them is a permissible use of its police power.
 8 (Doc. # 14).

9 A. First Amendment

10 Plaintiffs first argue that the ordinances violate the First Amendment by unduly
 11 restricting commercial speech. Regulations of commercial speech are subject to intermediate
 12 scrutiny.¹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S.
 13 557, 566 (1980) (Blackmun, J., concurring); *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 598 (9th
 14 Cir. 2010). To determine the permissibility of these restrictions, courts apply a four-part test.
 15 See *Cent. Hudson*, 447 U.S. at 557.

16
 17 First, commercial speech receives First Amendment protection only if it concerns lawful
 18 activity and is not misleading. *Id.* Second, the government's interest in regulating the speech
 19 must be substantial. *Id.* Third, the regulation must directly advance the government's
 20 substantial interest. *Id.* Fourth, the regulation must not be more extensive than necessary to
 21 serve that interest. *Id.*

22 Plaintiffs argue that the ordinances fail the third and fourth prongs of the *Central Hudson*
 23 test. While plaintiffs rely on *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), this case is
 24 distinguishable. *44 Liquormart* involved a complete prohibition on "advertising in any manner
 25 whatsoever" of alcoholic beverage prices. *Id.* at 489. The only exceptions were price tags and

26
 27 ¹ Plaintiffs argue that strict scrutiny applies to this case based on *44 Liquormart v. Rhode*
 28 *Island*, 517 U.S. 484, 500 (1996). However, *44 Liquormart* clearly establishes that such
 heightened scrutiny is only warranted in cases of complete bans on commercial speech. Because
 the ordinances here are not so severe, plaintiffs' arguments for strict scrutiny are misguided.

1 signs displayed with the merchandise. *Id.* Media advertising of prices was completely
 2 forbidden. *Id.*

3 While plaintiffs improperly classify the instant restrictions as a “blanket ban,” they are
 4 not nearly as severe as those in *44 Liquormart*. The ordinances prohibit the placement and
 5 quantity of price advertisement, but they do not forbid it. Sellers remain free to advertise outside
 6 certain ranges of visibility and within certain parameters of quantity. *See* LVMC 6.50.475.
 7 Further, the ordinances in no way restrict a seller’s ability to use media advertisement.
 8 Accordingly, *44 Liquormart* should not dictate the result here.

9 With regard to the third and fourth prongs of the *Central Hudson* test, plaintiffs fail to
 10 meet their burden of showing a likelihood of success on the merits. The city passed the
 11 ordinances to reduce alcohol consumption on Fremont Street. Restrictions on advertisements of
 12 low prices likely advance this purpose.

13 While plaintiffs argue that the ordinances are “significantly more extensive than is
 14 necessary,” they do nothing more than cite *44 Liquormart* in support of these claims. (Doc. #
 15 10). Although plaintiffs contend that less restrictive alternatives are available, this does not show
 16 a likelihood of success on the merits under the test for regulations of commercial speech. (Doc.
 17 # 13).

18 Based on the foregoing, plaintiffs fail to meet their burden to show a likelihood of
 19 success on the merits regarding the constitutional validity of the ordinances. Accordingly, they
 20 are not entitled to a preliminary injunction on these grounds.

21 *B. Bill of attainder*

22 Plaintiffs’ argument that the regulatory scheme here constitutes a bill of attainder is
 23 misguided. A bill of attainder “legislatively determines guilt and inflicts punishment upon an
 24 identifiable individual without provision of the protections of a judicial trial.” *Nixon v. Adm’r of*
 25 *Gen. Servs.*, 433 U.S. 425, 468 (1977). The ordinances regulate the sale of liquor. They do not
 26 target plaintiffs nor do they inflict punishment on them. Plaintiffs cannot show a likelihood of
 27 success on the merits of this argument.

1 *C. Sherman Act*

2 Plaintiffs' Sherman Act claims are similarly without merit. The Sherman Act prohibits
3 agreements that unreasonably restrain trade. *See* 15 U.S.C. § 1. The city has the power to
4 regulate liquor sales, and enforcement of the ordinances is not the type of conduct that the
5 Sherman Act prohibits.

6 Plaintiffs claim that the Sherman Act "preempts" local laws that force competitors to
7 violate the Sherman Act. (Doc. # 10). Plaintiff cites cases striking down liquor laws on these
8 grounds. *See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 97
9 (1980); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 886 (9th Cir. 2008). The regulations
10 at issue in those cases imposed specific pricing systems on sellers. Therefore, they are
11 distinguishable from the instant case.

12 Plaintiffs argue that the ordinances force them to violate antitrust laws by restricting
13 output, forbidding truthful price advertising, and horizontally allocating customers to other
14 retailers. (Doc. # 10). However, as defendant mentions, municipal regulations are not generally
15 subject to the Sherman Act, so long as they are effectuated pursuant to state policy. *City of*
16 *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370-71 (1991).

17 Plaintiffs have failed to convince the court that the ordinances at issue are even subject to
18 the Sherman Act. Even if the ordinances were deemed anticompetitive, they are likely exempt
19 pursuant to the case law above. Accordingly, plaintiffs have not shown a likelihood of success
20 on their Sherman Act claims. Therefore, they are not entitled to a preliminary injunction on
21 these grounds.

22 *D. Procedural due process*

23 Plaintiff G&G Fremont argues that the ordinances intrude on its constitutionally
24 protected interest in its business license. (Doc. # 10). In particular, G&G states that its business
25 license allows it to sell miniature bottles of alcohol in gift baskets, while the ordinances forbid
26 these sales. As a result, G&G claims that it is likely to succeed on the merits of a § 1983
27 procedural due process claim against the city.

1 “To have a property interest in a benefit, a person clearly must have more than an abstract
2 need or desire for it [h]e must, instead, have a legitimate claim of entitlement to it.” *Bd. of*
3 *Regents v. Roth*, 408 U.S. 564, 577 (1972). Substantive property interests are created by state
4 law, while federal constitutional law determines whether those interests are protected by the Due
5 Process Clause. *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (citing *Roth*,
6 408 U.S. at 577).

7 Plaintiffs again cannot show a likelihood of success on the merits of a procedural due
8 process claim. To support this claim, plaintiffs rely largely on a Seventh Circuit case which is
9 not binding in this jurisdiction. *See Reed v. Vill. of Shorewood*, 704 F.2d 943, 948 (7th Cir.
10 1983) (evaluating liquor license as property interest under Illinois law).

11 Plaintiffs also cite the Ninth Circuit’s assertion in *In re Petite Auberge Village, Inc.*, 650
12 F.2d 192, 194 (9th Cir. 1981), that a liquor license is a state-created property right. However,
13 that case involved issues unrelated to the instant case, and did not address due process rights. *Id.*
14 (affirming order allowing trustee to recover postpetition interest and tax penalties out of proceeds
15 of sale of bankrupt’s liquor license).

16 Defendant responds to plaintiffs’ arguments by citing two Nevada Supreme Court cases.
17 *See Kochendorfer v. Bd. of Cty. Com’rs*, 566 P.2d 1131, 1134 (Nev. 1977); *Gragson v. Toco*,
18 520 P.2d 616, 617 (Nev. 1974). Defendants contend that these cases establish that a liquor
19 license is not a property right subject to procedural due process protections. (Doc. # 14).

20 These cases do not conclusively establish that plaintiffs’ procedural due process claim is
21 without merit. However, plaintiffs have not met their burden of demonstrating that they possess
22 an underlying property right entitling them to procedural due process. Accordingly, plaintiffs
23 have failed to show a likelihood of success on the merits for any of its claims. For this reason,
24 the court will deny plaintiffs’ motion for a preliminary injunction.

25 Notably, plaintiffs also fail to meet their burden to prove the other three elements of the
26 *Winter* test. Plaintiffs’ motion presents largely conclusory arguments as to why plaintiffs would
27 suffer irreparable injury and why the public interest and a balancing of the hardships weigh in
28


1 their favor. These assertions are insufficient to meet the requisite burden for a preliminary
2 injunction. Based on the foregoing, the court will deny the motion.

3 **IV. Conclusion**

4 Accordingly,

5 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for
6 preliminary injunction, (doc. # 10), be, and the same hereby is, DENIED.

7 DATED October 9, 2014.

8 
9 UNITED STATES DISTRICT JUDGE